

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON COKE PRATER,

Defendant-Appellant.

UNPUBLISHED
November 8, 2002

No. 233036
Grand Traverse Circuit Court
LC No. 00-008246-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct (CSC 1), MCL 750.520b, and one count of first-degree home invasion, MCL 750.110a(2). The trial court sentenced him as a second habitual offender to imprisonment for eighteen to sixty years to be served concurrently for each CSC 1 conviction and twelve to thirty years for the first-degree home invasion conviction to be served consecutively to the CSC 1 sentences. Defendant appeals as of right. We affirm.

Defendant first argues that defense counsel was ineffective and that he was therefore deprived of his constitutional right to a fair trial. According to defendant, defense counsel was ineffective for disclosing to the jury in opening argument the fact that defendant had a prior conviction in Texas for credit card abuse. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defense counsel's decision to disclose defendant's prior conviction to the jury could reasonably be considered sound trial strategy in light of the fact that the prosecutor moved before trial to be permitted to impeach defendant with evidence of the conviction. Moreover, defendant's subsequent decision not to testify was made under the advice of counsel, and such decisions are also matters of trial strategy. *Id.* at 304. The fact that defendant did not testify

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

does not render defense counsel's disclosure improper. This Court will not assess counsel's competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant also asserts that defense counsel was ineffective for calling defendant's mother as a witness when she had a prior conviction for writing a bad check. It appears from the record that defense counsel actually represented defendant's mother in the action that resulted in her plea-based conviction. Whether defense counsel recalled representing defendant's mother is not entirely clear from the record. In any event, defense counsel's decision to call defendant's mother as a witness is presumed to be a matter of trial strategy and defendant has not overcome the presumption.

Defendant next argues that defense counsel was ineffective in failing to comply with the prosecutor's discovery request. According to defendant, as a result of defense counsel's noncompliance with the discovery request, defendant was unable to call his stepfather as a witness and was unable to thoroughly cross-examine another witness. The trial court never specifically ruled on whether defendant's stepfather could testify because defendant agreed not to call his stepfather as a witness. Even if defense counsel agreed not to call the witness in part because of his failure to comply with the discovery request, a decision to call a witness is a matter of trial strategy. Moreover, counsel's failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Defendant's defense was that the victim consented. Defendant argues in his appellate brief that his stepfather's testimony would have corroborated the defense theory of the case. However, because no *Ginther*¹ hearing was held, our review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). Therefore, we cannot say that defendant has overcome the presumption of effective counsel where it is unknown what testimony would actually have been presented. Moreover, even had defendant's stepfather testified as asserted by defendant, it would merely have mimicked defendant's mother's testimony, which the jury either rejected or deemed insignificant in light of the verdict, and which did not involve personal observation of the crime and contradicted other evidence based on personal observation. In other words, defendant suffered no prejudice.

Defendant also asserts that defense counsel's failure to comply with the prosecutor's discovery request deprived him of the opportunity to impeach a crucial prosecution witness. Decisions regarding the cross-examination of witnesses are a matter of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). Moreover, a defendant who asserts that he was denied the effective assistance of counsel must demonstrate that there was a mistake that caused him prejudice. *People v Crawford*, 232 Mich App 608, 615; 591 NW2d 669 (1998). To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Toma, supra* at 302-303. Defendant has not alleged how defense counsel's inability to impeach the witness caused

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

him prejudice or that the result of the proceedings would have been different if he had been permitted to impeach the witness' testimony. Therefore, defense counsel's actions did not constitute ineffective assistance of counsel and did not deprive defendant of a fair trial.

Defendant next argues that numerous instances of prosecutorial misconduct deprived him of a fair trial. Specifically, defendant argues that some of the prosecutor's comments during closing argument and rebuttal closing argument were improper. The prosecutor's comments regarding the fact that defendant's stepfather did not testify were not improper because, contrary to defendant's argument, they did not mislead the jury. Moreover, to the extent that the comments suggested that the testimony of defendant's mother was not credible and should not be believed, they were proper because a prosecutor is permitted to argue from the facts that a witness is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

The prosecutor's statement regarding defense counsel's suggestion that a prosecution witness lied to bolster or corroborate the victim's testimony was not improper because a prosecutor may properly respond to the innuendos of defense counsel that his witness is fabricating testimony. *People v Sharbnow*, 174 Mich App 94, 101; 435 NW2d 772 (1989). In addition, the prosecutor's statement asking who defense counsel worked for was not misleading because it pointed out a true fact: that defense counsel was acting as an advocate for defendant. Furthermore, reading the prosecutor's remark about rendering "a true and just verdict" in context, the prosecutor properly urged the jury to make its decision based on the evidence.

Defendant's contention that the prosecutor's comments comparing a murder victim and a rape victim were improper is also without merit. Contrary to defendant's contention, the comments did not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Rather, the comments were based on the victim's testimony and concerned the impact of the crime on the victim. It is permissible for a prosecutor to comment on the evidence and draw all reasonable inferences therefrom. *People v Kris Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Moreover, a prosecutor need not confine his argument to the blandest of all possible terms. *Id.* The trial court specifically instructed the jury that its decision must be based on the evidence and that sympathy must not influence its decision. Under these circumstances, the prosecutor's comments were not improper.

Defendant's contention that the prosecutor's comment that the jury could say to the victim, "we believe you," also was not improper. A prosecutor may argue that a witness should be believed. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

Defendant finally contends that defense counsel was ineffective for failing to object to the alleged prosecutorial misconduct. This argument is without merit because the prosecutor's remarks were not improper, and defense counsel is not obligated to make meritless or futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002); *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Considering all of the alleged errors raised by defendant, including the claims related to ineffective assistance of counsel, we conclude that even had these been actual errors, defendant was not prejudiced because of the overwhelming evidence establishing defendant's guilt beyond a reasonable doubt. MCL 769.26; *People v Lukity*, 460 Mich 484, 491-495; 596 NW2d 607 (1999).

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof